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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 TYLERRE C. PERRY,

12 Petitioner,

13 vs.

14 G. J. JANDA,

15 Respondent.
16

CASE NO. 12cv2512-LAB (JMA)

**ORDER OVERRULING
OBJECTIONS TO REPORT AND
RECOMMENDATION; AND**

**ORDER DENYING PETITION FOR
WRIT OF HABEAS CORPUS**

17 **Introduction**

18 Petitioner Tylerre Perry, a prisoner in state custody, filed a petition for writ of habeas
19 corpus pursuant to 28 U.S.C. § 2254. His sole claim is that the trial court committed error
20 under *Doyle v. Ohio*, 426 U.S. 610 (1976) by admitting two statements he made after he was
21 advised of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). The petition was
22 referred to Magistrate Judge Jan Adler for report and recommendation. On October 3, 2013,
23 Judge Adler issued his first report and recommendation, recommending that the writ be
24 denied. After several extensions of time to file objections, Perry in late December filed
25 various motions, including one seeking leave to amend the petition. Perry argued he did a
26 poor job of researching and presenting his arguments, and requested permission to file the
27 amended petition he attached as an exhibit. That motion was referred to Judge Adler for
28 report and recommendation, and in light of this motion, the Court directed Judge Adler to

1 issue a revised report and recommendation addressing the proposed amended petition, and
2 making a recommendation whether Perry would be entitled to relief either under the original
3 petition or the amended petition.

4 On April 4, 2014, Judge Adler issued his new report and recommendation (the
5 "R&R"), which recommended that leave to be amend be granted, but that even after the
6 amendment, Perry could not prevail and the petition should be denied. Respondent did not
7 object to the R&R, but Perry did. The Court therefore **ACCEPTS** the amended petition as
8 Perry's operative pleading.

9 **Legal Standards**

10 A district court has jurisdiction to review a Magistrate Judge's report and
11 recommendation on dispositive matters. Fed.R.Civ.P. 72(b). "The district judge must
12 determine de novo any part of the magistrate judge's disposition that has been properly
13 objected to." *Id.* "A judge of the court may accept, reject, or modify, in whole or in part, the
14 findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1). The
15 Court therefore reviews de novo those portions of the R&R to which specific written objection
16 is made. *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir.2003) (en banc). "The
17 statute makes it clear that the district judge must review the magistrate judge's findings and
18 recommendations de novo if objection is made, but not otherwise." *Id.*

19 The R&R correctly states the standards for issuance of a writ of habeas corpus, and
20 the Court does not repeat those here, except as necessary.

21 **Factual Background**

22 The following factual background is taken from the R&R's recitation of facts (R&R,
23 6:4–10:7), to which Perry does not object, and which the Court **ADOPTS**.

24 The California Court of Appeals found that on April 22, 2006, Keenan Wheeler and
25 his friend Spencer Watts obtained Ecstasy pills that they planned to sell. That night, Watts
26 received a phone call asking him to meet a potential buyer in the parking lot of a local
27 shopping center. Watts drove there, with Wheeler as his passenger. Two men, who
28 identified themselves as members of a Crips gang, got in, greeted Wheeler and Watts, and

1 asked to see the drugs. One of the men, later identified as Perry, sat behind Watts. Watts
2 handed Perry a bag of pills and told him how much they cost. Perry then pulled out a gun
3 and he and his associate began to rob them, going through their pockets and taking cash.
4 When Watts resisted and tried to drive away, Perry's associate urged Perry to shoot Watts,
5 and Perry did, killing him. (R&R, 6:11–7:19 (quoting Lodgment 5).)¹

6 After an investigation of a year and a half, police arrested Perry. Following his arrest,
7 Perry was in the custody of Detective Pendleton. Pendleton and his partner read Perry his
8 *Miranda* rights, then asked Perry whether he was willing to talk. When Perry asked for an
9 attorney, the interview ended. Perry was then booked and put into a holding cell while
10 Pendleton completed paperwork. While Pendleton was completing paperwork, Perry asked
11 him how he could give Pendleton information about what happened. Pendleton gave him
12 his business card, but did not ask him any questions. Pendleton then took Perry to a patrol
13 car to be transported to the county jail, but after Perry said he had forgotten a phone number
14 in his personal property, he was removed from the car and placed at a table so that he could
15 look through his property and find it.

16 Without Pendleton asking any questions, Perry then said he did not want to “screw
17 himself.” Pendleton, in response, asked whether that meant Perry was intending to talk to
18 him—and if that was what Perry did mean, Pendleton would take him back into the station
19 to give him his *Miranda* admonition again. Perry then answered “No, this was an accident.”
20 When Pendleton said it² did not appear to be accidental,” Perry said “There was a witness.”
21 Pendleton replied “We spoke to a lot of witnesses,” and Perry said “You guys are trying to
22 put me [in] jail.” (See R&R, 11:2–9.) The statements to the effect that the shooting was an
23 accident and that Perry did not want to “screw himself” were admitted over defense
24 objections, and form the basis for Perry's challenge. The other statements were not

25 ¹ This portion of the factual recitation is cited for the purpose of showing what the
26 state courts found. The Court defers to these findings and presumes them to be correct,
27 unless Perry rebuts them by clear and convincing evidence. *See Tilcock v. Budge*, 538 F.3d
28 1138, 1141 (9th Cir. 2008). Perry denies being the shooter, but he does not dispute that this
is essentially the way in which events unfolded.

² Perry testified that he understood “it” to refer to the shooting.

1 admitted, and the word “No” in response to Pendleton’s remark about re-admonishing Perry
 2 was also not admitted. The state courts held the two admitted remarks were spontaneous
 3 and voluntary and not made in response to questioning.

4 **Discussion of Objections**

5 Perry begins his Objections to the R&R with a detailed introduction and discussion
 6 of background information, most of which does not disagree in any material way with the
 7 R&R. He expressed some disagreement with the state courts’ holding that his two remarks
 8 were spontaneous and voluntary, and argued that they were instead part of the questioning
 9 that had taken place earlier.

10 While Perry had mentioned some of his legal objections in passing earlier, they begin
 11 in earnest on page 19. Perry’s first three objections are all related to the admission of a
 12 statement he made after invoking his right to silence, which he claims constituted a *Doyle*
 13 error. Perry’s fourth objection is to the R&R’s suggestion that even if a *Doyle* error occurred,
 14 it was harmless.

15 **Objection: The remarks were a continuation of earlier questioning**

16 Perry’s argument focuses not on the evidence itself but on the state courts’ and the
 17 R&R’s interpretation of the evidence. He does not point to evidence not before the state
 18 courts, and in any event he Court’s review is limited to the record before the state courts.
 19 *Cullen v. Pinholster*, ___ U.S. ___, 131 S.Ct. 1388 (2011).

20 Perry’s objections cite record evidence (Obj. at 4:26–9:21), and he argues that
 21 evidence shows that his statements were made as part of one continuous conversation and
 22 in relation to his request for an attorney. (*Id.* at 9:22–10:5.)³ But Perry badly misconstrues
 23 the evidence he cites. While Perry was in the custody of Detective Pendleton, he invoked
 24 his right to counsel, and the interview ended. Perry was then taken to a holding cell for
 25 fifteen to twenty minutes while Pendleton completed paperwork. Perry initiated a
 26 conversation by asking how he could give the police information, but Pendleton did not talk

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 28 ³ Perry had asked for an attorney in response to a question. When the state courts
 determined that the two remarks were not made in response to questioning, they necessarily
 found that the two remarks were not part of the earlier questioning, as Perry now argues.

1 with him about it at the time. Instead, Pendleton gave Perry his business card, implying that
2 Perry could talk later if he wanted to. Perry was then put into a police car to be transported.
3 While there, Perry said he had forgotten a phone number, and he was taken out of the car
4 and made to sit at a table in order to look through his belongings and find it. It was then that
5 Perry made the two remarks.

6 Although Perry claims the evidence he cites shows the conversations were
7 continuous, he immediately thereafter admits they occurred fifteen to twenty minutes apart.
8 (*Id.* at 9:28.) And although he says they were "in relation to Perry seeking counsel," (*id.* at
9 10:2), the evidence he cites shows this isn't true; the invocation of the right to counsel had
10 occurred much earlier at a different place, and several events and two other brief
11 conversations had intervened. The state courts' express determination that Perry made the
12 two statements spontaneously, voluntarily, and not in response to questioning is certainly
13 reasonable, and Perry's interpretation of the evidence is unreasonable.

14 **Objection: Failure to cite precedent to support state court rulings**

15 Perry's first objection is that "the Magistrate and State Court have yet to present or
16 [cite] a single case, and or, law that simply and directly establishes that only a 'portion' of a
17 statement of invocation is protected under any constitution, any amendment, or any existing
18 case law." (Obj. at 22:3–7.) In support, Perry states that "the Magistrate cites 'all' cases that
19 simply and clearly establish in the U.S. Supreme Court the protection of the ENTIRE
20 statement of invocation, and the reasoning why." (*Id.* at 28:7–11 (emphasis in original).)

21 This objection is incorrect, because the R&R does cite precedent. (See, e.g., R&R at
22 17:12–22:15.) Moreover, this objection, even if it were true, doesn't show why the R&R is
23 wrong. Under § 2254(d), the Court can only grant the writ as to a legal issue if the state
24 courts' adjudication of Perry's claim was contrary to or involved an unreasonable application
25 of clearly established federal law as determined by the U.S. Supreme Court. In other words,
26 the state court rulings don't need to be supported by citation to federal law. Rather, Perry
27 must show that the state courts' rulings were contrary to U.S. Supreme Court precedent.

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1 This objection could also be construed as a “blanket” objection to the R&R’s
 2 reasoning overall, *i.e.*, an argument that the R&R simply reached the wrong legal conclusion.
 3 But a general conclusory objection that the R&R is wrong is not the kind of specific written
 4 objection that triggers *de novo* review. See *Saibu v. McEwen*, 2014 WL 1877446 at *1
 5 (S.D.Cal., May 9, 2014) (citing *United States v. Midgette*, 478 F.3d 616, 621 (4th Cir. 2007)).

6 **Objection: No portion of Perry’s statement should have been used at trial**

7 Perry’s second objection, which is closely related to his first, is that “the scalpel
 8 technique to excise out a portion of Perry’s statement of invocation, does not permit its use
 9 at trial.” (Obj. at 23:19–21.) Both Perry’s first and second objection seem to be based on the
 10 section of the R&R concluding that “[t]he state appellate court reasonably found, applying
 11 clearly established Supreme Court authority, that the trial court’s exclusion of ‘No,’ but
 12 admission into evidence of the remainder of the subject statements, adequately protected
 13 Petitioner’s right to invoke his Fifth Amendment right to silence.” (R&R at 21:20–24.)

14 This objection draws some support from *United States v. Bushyhead*, 270 F.3d 905,
 15 912 (9th Cir. 2001) (holding that an invocation of the right to remain silent, coupled with an
 16 explanation of the reason for remaining silent, was inadmissible). *Bushyhead*, however, dealt
 17 with a statement that was not volunteered and given before *Miranda* warnings had been
 18 given. It distinguished cases dealing with unsolicited confessions. See *id.* at 912–13. The
 19 panel in *Bushyhead* distinguished *Rhode Island v. Innis*, 446 U.S. 291 (1980)), which held
 20 that a suspect’s unsolicited remarks did not implicate *Miranda*.

21 The state courts’ interpretation of the facts, finding that Perry spontaneously
 22 volunteered his remarks, was reasonable. Perry had been given *Miranda* warnings earlier,
 23 and he invoked his right to remain silent until he spoke with an attorney. He made the two
 24 later remarks in a time and place when the focus was on transporting him, not questioning
 25 him. He had already invoked his rights and his invocation was being respected. He had been
 26 left in a holding cell for 15 to 20 minutes while Detective Pendleton completed paperwork,
 27 and was then moved to a sally port for transportation when he decided to speak. Although
 28 he had mentioned the possibility that he might give information, Detective Pendleton

1 responded to that by simply giving Perry his business card, implying that Pendleton did not
2 expect Perry to speak to him then and there. There was no reason to think Perry was
3 invoking his rights a second time.

4 Of the two admitted remarks, the first (that he didn't want to "screw himself") was not
5 made in response to a question or anything else Detective Pendleton said. The second was
6 made in response to Pendleton's question regarding whether Perry intended to speak and,
7 if so, whether he needed to be given *Miranda* warnings again. Perry's response of "No, this
8 was an accident" is difficult to construe. It's possible the "No" meant "No, I'm not going to say
9 anything" or "No, I don't need *Miranda* warnings again," or "I shouldn't be here because this
10 was an accident," or possibly something else. In any case, the "No" was not admitted, but
11 the remainder of his statement, "this was an accident," was.

12 The timing and circumstances under which the remarks were made reasonably
13 support the state court's conclusion that Perry was talking spontaneously, not making an
14 explanatory invocation of his right to silence, and Perry has not rebutted this finding. Because
15 the Court defers to the state courts' unrebutted findings that Perry volunteered his
16 statements and did not make them in connection with invoking his rights, there is no factual
17 basis for applying *Bushyhead* here.

18 **Objection: The State Court Erred in Failing to Follow *Bushyhead***

19 Perry's third objection is that his "reliance [sic] on *Bushyhead* couldn't be more exact."
20 (Obj. at 23:23-24.) This objection does not seem to be aimed at the R&R, but rather at the
21 California Court of Appeal's decision not to follow *Bushyhead*, "finding it unpersuasive and
22 finding the Petitioner's reliance on *Bushyhead* misplaced." (R&R at 21:5-7.)

23 The state court agreed with that portion of *Bushyhead* which held that a defendant's
24 remark "I have nothing to say" was inadmissible. (Lodgment 5 at 20-21.) It also noted facts
25 that would have distinguished Perry's case from *Bushyhead*, including the fact that Perry's
26 remarks were spontaneous and volunteered, and made well after Perry had received
27 *Miranda* warnings but not as a part of invoking his *Miranda* rights. (*Id.* at 23-24.) Accepting

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1 these findings as true, *Bushyhead* would be inapplicable, and Perry's reliance on it would
2 indeed be misplaced.

3 The state court also expressed fundamental disagreement with *Bushyhead*, and
4 believed that decision wrongly applied Supreme Court precedent. (Lodgment 5 at 20–23.)
5 For that reason too, the state court declined to follow it. Importantly, *Bushyhead* is a Ninth
6 Circuit decision; the Supreme Court has not established the same principle in any of its
7 holdings. See *United States v. Gomez*, 725 F.3d 1121, 1127 (9th Cir. 2013) (citing Ninth
8 Circuit precedent for the principle that a defendant's "explanatory refusal" to speak cannot
9 be introduced against him in the government's case-in-chief). Even assuming *Bushyhead*
10 were applicable here, it is not "clearly established Federal law, as determined by the
11 Supreme Court of the United States." See 28 U.S.C. § 2254(d). The state court was not
12 obligated to follow it, and failure to follow it does not entitle Perry to habeas relief.

13 **Objection: Doyle Error Was Not Harmless**

14 Perry's fourth objection is to the R&R's suggestion that even if a *Doyle* error occurred,
15 it was harmless. (R&R at 22:26-28, 23:1) Perry claims that "[g]iven the evidence, there's no
16 doubt as to the prejudiceness [sic] of the statements in question. The entire case against
17 Petitioner was circumstantial therefore, banking on the statements of Petitioner's post arrest
18 silence." (Obj. at 31:19-23.)

19 In fact, the case against Perry was strong and the admitted statements were not
20 decisive. The gist of the statements was that Perry thought there was a danger he would
21 accidentally say something foolish, and that the shooting was an accident. While these
22 remarks could be construed to show consciousness of guilt, they are not strongly
23 incriminating. This is particularly true when they are compared to the rest of the case against
24 him, which included an eyewitness description of the shooter that matched Perry, evidence
25 that the shooter identified himself as a Crip coupled with Perry's stipulation that he was a
26 Crip, the discovery of Perry's fingerprints on the victim's car, and Perry's confession at a
27 party. The evidence showing Perry was present at the shooting was so strong that his

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1 counsel did not attempt to deny it. (See Lodgment 5 at 13–14 (quoting defense counsel’s
2 opening statement).)

3 While the state court did not dwell on other evidence, it bears mentioning that the
4 killing took place during a robbery where four men were present: Watts (the victim), Wheeler
5 (who testified at trial), Perry, and Perry’s associate. Watts and Wheeler were there to sell
6 ecstasy pills, and Perry and his associate were ostensibly there to buy them. Both Perry and
7 his associate robbed Wheeler, and then began to rob Watts. When Watts resisted, one of
8 the two robbers (identified as Perry’s associate) said “Shoot him” and the other (identified
9 as Perry) did. (Lodgment 5 at 4.) With this evidence before them, the jury could hardly have
10 believed the two robbers were strangers, that Perry was uninvolved in the robbery, or that
11 he did not intend for the victim to be shot. Even if they had accepted defense counsel’s
12 argument that the shooter was someone else (*Id.* at 13–14), the jury likely would have
13 concluded Perry ordered the killing and that it was done in furtherance of the armed robbery
14 he and his associate were committing.

15 It is also relevant that numerous phone calls were made between Perry’s girlfriend’s
16 phone and Watts’ phone in the days leading up to the robbery and killing, including one on
17 the evening Watts was killed. Perry’s girlfriend denied making the calls, and suggested that
18 Perry may have used her phone to make them. In addition, fingerprint evidence showed that
19 Perry entered Watts’ car through the passenger door on the driver’s side, suggesting that
20 he was the one who sat behind Watts. Wheeler testified that the man who sat behind Watts
21 was the shooter. Wheeler’s descriptions of the two robbers established they looked different,
22 and Wheeler’s description of the shooter pointed to Perry. All this amounts to far more than
23 merely circumstantial evidence, and Perry was not, as he now claims, convicted solely on
24 the strength of the two admitted statements.

25 Perry points to portions of the record he believes show the case against him was
26 weak. (Obj. at 29–31.) He argues Wheeler merely described him as the shooter rather than
27 identifying him as such; that there are several Crips gangs and perhaps the shooters were
28 members of a different Crips gang than Perry was; that the witnesses who originally reported

1 Perry's confession were reluctant or unreliable; that the officer who took statements
2 regarding the confession failed to make written notes or a recording; that a witness who
3 looked into the car before the shooting saw no signs of a struggle; and that one of the calls
4 between Perry's girlfriend's phone and Watts' phone was made while Perry was supposedly
5 in the car with Watts. Most of these are at best minor issues. The strongest are those that
6 might call into question the reliability of evidence of Perry's confession. But the state court
7 discussed those at length, and explained its reasons for concluding that evidence was
8 reliable enough to be admitted. (Lodgment 5 at 25–31.)

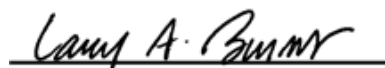
9 The deferential standard on habeas review is generally whether the Court has "grave
10 doubt as to the harmlessness of the error." See *Cudjo v. Ayers*, 698 F.3d 752, 768 (9th Cir.
11 2012) (citing *Chapman v. California*, 386 U.S. 18, 24 (1967)). But where, as here, the state
12 court has applied the higher, "harmless beyond a reasonable doubt" standard (see
13 Lodgment 5 at 24 (finding that if any *Doyle* error occurred, it was harmless beyond a
14 reasonable doubt) (citing *Chapman*)) the Court must defer to the state court's determination
15 unless it is unreasonable. *Cudjo* at 768. Even accepting that the evidence was as Perry now
16 reports it, it is not compelling. The state courts' determination was reasonable, and the Court
17 defers to it. Furthermore, the Court does not harbor grave doubts as to the harmlessness
18 of the error.

19 **Conclusion and Order**

20 For the reasons set forth above, Perry's objections to the R&R are **OVERRULED** and
21 the Court **ADOPTS** the R&R. The petition is **DENIED** and a certificate of appealability is also
22 **DENIED**.

23 **IT IS SO ORDERED.**

24 DATED: August 15, 2014

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26 **HONORABLE LARRY ALAN BURNS**
27 United States District Judge
28